Public Finance Bhd v Mohamad Adnan bin Mamat Nor

HIGH COURT (KUALA TERENGGANU) — CIVIL APPEAL NO 11-09 OF 1998
ABDUL KADIR SULAIMAN J
10 MAY 1999

Civil Procedure *— Affidavits — Affidavit not served within 14 days from date of filing — Whether service of affidavit is notice of intention to use affidavit — Subordinate Courts Rules 1980 O 24 r 4(1)(a) & (2)(a)*

The magistrate's court had on 21 April 1998 entered default judgment against the respondent for its failure to file its defence and also for failure to attend. The respondent filed an application with a supporting affidavit ('the affidavit') under O 28 r 8 of the Subordinate Courts Rules 1980 ('the SCR') to have the default judgment set aside. The appellant raised a preliminary objection on the admissibility of the affidavit as being in breach of O 24 r 4(1)(a) of the SCR for failure to give any notice to the appellant of its intention to use the affidavit and also in breach of O 24 r 4(2)(a) of the SCR for failure to serve the same on it within 14 days from the date of the filing of the application. The learned magistrate rejected the preliminary objection of the appellant and proceeded to hear the application of the respondent on its merit. He allowed the application of the respondent and set aside the default judgment he made on 21 April 1998. The appellant appealed to the judge in chambers against the decision.

Held, allowing the appeal:

Service of the affidavit on the appellant in this case is a notice given for the purpose of O 24 r 4(1)(a) of the SCR. The respondent had duly complied with such requirement by having the affidavit in support served on the respondent on 25 May 1998 together with the application. Hence, the respondent in this case has not breached the requirement of the rule (see p 479F). However, the impugned affidavit which was served on the appellant well beyond the time prescribed by O 24 r 4(2)(a) of the SCR was clearly done in breach of the rule. It should not have been accepted by the learned magistrate as being in evidence in support of the respondent's application. Therefore, the court need not hear the argument on the merit of the appeal as the learned magistrate was wrong in setting aside the default judgment of 21 April 1998 in the absence of any evidence in support of the respondent's application to set aside the default judgment (see p 480F–G).

[Bahasa Malaysia summary

Mahkamah majistret telah pada 21 April 1998 memasukkan satu penghakiman ingkar terhadap responden kerana kegagalan

memfailkan pembelaan dan juga kegagalan untuk hadir. Responden telah memfailkan suatu permohonan dengan afidavit sokongan (afidavit tersebut') di bawah A 28 k 8 Kaedah Mahkamah Rendah 1980 ('KMR') untuk mengetepikan penghakiman ingkar tersebut. Perayu telah menimbulkan satu bantahan awal tentang ketidakboleh-terimaan afidavit tersebut sebagai telah melanggari A 24 k 4(1)(a) KMR kerana kegagalan untuk memberikan apa-apa notis kepada perayu tentang niat beliau untuk menggunakan afidavit tersebut dan juga melanggari A 24 k 4(2)(a) KMR kerana kegagalan untuk menyerahkan yang sama di dalam tempoh 14 hari daripada tarikh permohonan tersebut difailkan. Majistret yang arif menolak bantahan awal perayu dan seterusnya mendengar permohonan responden atas meritnya. Beliau membenarkan permohonan responden dan mengetepikan penghakiman ingkar yang beliau buat pada 21 April 1998. Perayu telah merayu kepada hakim dalam kamar terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan tersebut:

Serahan afidavit kepada perayu di dalam kes ini adalah satu notis yang diberi bagi tujuan A 24 k 4(1)(a) KMR. Responden telah mematuhi dengan wajarnya keperluan tersebut dengan menyerahkan afidavit sokongan tersebut ke atas responden pada 25 Mei 1998 bersama dengan permohonan tersebut. Oleh itu, responden di dalam kes ini tidak melanggar keperluan kaedah tersebut (lihat ms 479F). Walau bagaimanapun, afidavit yang dipersoalkan tersebut yang telah diserahkan ke atas perayu di luar masa yang ditetapkan oleh A 24 k 4(2)(a) KMR, dengan nyata berlaku pelanggaran kedah tersebut. Ia sepatutnya tidak diterima oleh majistret yang arif sebgai satu keterangan sokongan kepada permohonan responden. Oleh itu, mahkamah tidak perlu mendengar hujah di atas merit rayuan tersebut kerana majistret yang arif telah khilaf di dalam mengetepikan penghakiman ingkar 21 April 1998 tersebut dengan ketiadaan keterangan sokongan permohonan responden untuk mengetepikan penghakiman ingkar tersebut (lihat ms 480F–G).]

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1999 Reissue) paras 219–293.

Legislation referred to

Subordinate Courts Rules 1980 O 24 rr 4(1)(a), 4(2)(a), O 28 r 8, O 29 r 14

Ahmad Kamil bin Noh (*Lin & Associates*) for the appellant.
Ab Aziz bin Ab Rahman (*Ab Aziz & Rakan-Rakan*) for the respondent.

Abdul Kadir Sulaiman JCA: In the Magistrate's Court, Kemaman, the appellant as plaintiff, a finance company, issued a summons against the respondent as defendant claiming a sum of RM22,000 with interest at 8% pa from 4 June 1991 until realisation and costs. The claim arose out of the purchase by the appellant from the respondent for the purpose of its business of hire purchase, a motorcar which subsequently was alleged to be a stolen vehicle.

The respondent disputed the claim and the court below allowed time for the respondent to file its statement of defence and fixed a subsequent date for the parties to appear. On the return date the respondent failed to turn up and by that date also it had failed to file its defence as earlier directed. The appellant, however, appeared. Upon the application of the appellant, the court by its order of 21 April 1998 entered default judgment against the respondent for its failure to file its defence and also for failure to attend.

The respondent, aggrieved with the said decision, on 25 May 1998 filed an application with a supporting affidavit under O 28 r 8 of the Subordinate Courts Rules 1980 ('the SCR') to have the said default judgment set aside. However the said affidavit in support was only served on the appellant on 10 June 1998 which is 16 days after the filing of it in court. Before the learned magistrate and before me, the learned counsel for the appellant raised a preliminary objection on the admissibility of the said affidavit in support of the respondent being in breach of O 24 r 4(1)(a) of the SCR for failure to give any notice to the appellant of its intention to use the said affidavit, and also in breach of O 24 r 4(2)(a) of the SCR for failure to serve the same on it within 14 days from the date of the filing of the application. In the circumstances, the appellant urged upon the court to ignore the said affidavit in support. However, the learned magistrate rejected the said preliminary objection of the appellant on the two grounds and proceeded to hear the application of the respondent on its merit. On the evidence before the learned magistrate he allowed the application of the respondent and by his order of 19 July 1998 set aside the default judgment he made on 21 April 1998. Hence this appeal by the appellant to the judge in chambers against the said decision.

Order 24 of the SCR states as follows:

> 4 (1) Any party —
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> (a) filing an affidavit intended to be used by him in any proceedings in chambers; or
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> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
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> must give notice to every other party of the filing or, as the case may be, of his intention to do so.
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> (2) Except as otherwise provided by these rules —
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> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

A (b) a party intending to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

On the issue of the breach of O 24 r 4(1)(a) of the SCR for the failure on B the part of the respondent to give notice to the appellant of its intention to use the said affidavit in support, it was submitted before me by the learned counsel for the appellant that the respondent did not give any notice to it of the intention to use the said affidavit in support of its application to set aside the default judgment. With respect, I think the learned counsel has misconstrued the provisions of O 24 r 4(1)(a) of the SCR. There are two C limbs to the said r 4(1). The first concerns the affidavit intended to be used in the present proceedings in chambers, and the second concerns the use in the present proceedings in chambers of an affidavit filed in any previous proceedings. As regards the first, the rule merely requires that notice of such filing be given to the other party. As to the second, since in the present proceedings the party intends to use an affidavit meant for a previous D proceedings, the rule requires that a notice of such intention to use it in the present proceedings must be given to the other party. Applying the fact of this case to the matter before the learned magistrate and before me now in this appeal, the use of the affidavit previously filed is not at all in issue. Therefore, it is not correct for the learned counsel for the appellant to E suggest that the respondent is required to give notice of the respondent's intention to use the said affidavit in support filed for the purpose of the proceedings to set aside the default judgment then before the learned magistrate. All that is necessary for the respondent to do in the circumstances is to give notice to the appellant of the filing of the said affidavit in support in compliance with the requirement of O 24 r 4(1)(a) of F the SCR. In this case I find that the respondent had duly complied with such requirement by having the said affidavit in support served on the respondent on 25 May 1998 together with the said application. Service of the said affidavit upon the appellant in this case is a notice given for the purpose of O 24 r 4(1)(a) of the SCR. Hence, the respondent in this case has not breached the requirement of the said rule. My reason is supported G by the use of the phrase "as the case may be" in the condition requiring the giving of notice in the said r 4 which governs the position applicable respectively of either sub-rule (a) or (b) thereof. As such the objection on that ground has no merit. The learned magistrate was therefore, correct in overruling the preliminary objection on that ground.

H I will now deal with the next matter raised in the preliminary objection of the appellant. It is on the allegation of the breach of O 24 r 4(2)(a) of the SCR by the respondent in failing to serve the said affidavit in support on the appellant within 14 days from the date of the filing of the application to set aside the default judgment. It is not in dispute that the application of the respondent together with the affidavit in support for setting aside the default I judgment were filed on 25 May 1998 and both were served on the appellant only on 10 June 1998. The learned counsel for the respondent contends that even though the said affidavit was served beyond 14 days of its filing, it

is admissible because the provisions of O 24 r 4(2)(a) of the SCR does not apply. This is so because the respondent's application was made under a specific provisions in the SCR which is O 28 r 8 which states:

> (1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the court, on the application of that party, on such terms as it thinks just.
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> (2) An application under this rule shall be subject to O 29 r 14.

Hence, the procedure for making such an application is as laid down in O 29 r 14 of the SCR. The Order states:

> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

While this may be so, but O 28 read with O 29 of the SCR thereof make no mention of the filing and the serving of affidavits. They are concerned only with the application. Order 29 r 14 of the SCR deals with the application which must be made to the court and serve on the other party who has obtained the judgment within 30 days after the receipt of the order or judgment. Such an application must necessarily be made to the court and be heard in chambers: See O 24 r 1 of the SCR. In making such an application under O 28 of the SCR the evidence in support thereof must be in the form of an affidavit as is done in this case by the impugned affidavit. Such application and proceedings being one in chambers by virtue of O 24 of the SCR, the impugned affidavit is caught by the operation of r 4 thereof. The impugned affidavit having being filed in court but served on the appellant well beyond the time prescribed by O 24 r 4(2)(a) of the SCR is clearly done in breach of the rule and therefore ought not to have been accepted by the learned magistrate as being in evidence in support of the respondent's application. In the circumstances, the preliminary objection of the appellant on this ground ought to have been sustained. That being the position, even though the said affidavit in support of the respondent met the requirement of O 24 r 4(1)(a) of the SCR but it failed the test of r 4(2)(a) thereof of the SCR. I therefore, need go no further to hear the argument on the merit of the Appeal because by the absence of any evidence in support of the respondent's application to set aside the default judgment, the learned magistrate was clearly wrong in his order of 19 July 1998 setting aside his default judgment of 21 April 1998 on no evidence. This appeal by the appellant is therefore, allowed with costs. The order of the learned magistrate of 21 April 1998 is hereby affirmed.

Appeal allowed.

Reported by Benjamin Yong